Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-92

In The

Supreme Court of the United States

October Term, 1989

DAVIS IRON WORKS, INC.,
Petitioner,

vs.

IRVING J. ROSENBAUM,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

DOES A GENERAL RELEASE OF CLAIMS FOR BREACH OF FIDUCIARY DUTY EXECUTED BY A PENSION PLAN PARTICIPANT IN SETTLEMENT OF A PLAN-RELATED DISPUTE BAR FUTURE CLAIMS OF BREACH OF FIDUCIARY DUTY UNRELATED TO THE SETTLED DISPUTE?

II.

RESPONDENT CONTENDS THAT THIS QUESTION IS A SUBSIDIARY OF QUESTION I AND SHOULD ONLY BE CONSIDERED IN CONNECTION WITH QUESTION I PURSUANT TO SUPREME COURT RULE 21.1(a).

III.

RESPONDENT CONTENDS THAT THIS QUESTION IS A SUBSIDIARY OF QUESTION I AND SHOULD ONLY BE CONSIDERED IN CONNECTION WITH QUESTION I PURSUANT TO SUPREME COURT RULE 21.1(a).

IV.

IS A RETIRED PARTICIPANT OF A DEFINED BENEFIT PENSION PLAN, WHOSE VESTED BENEFIT HAS NOT BEEN DISTRIBUTED TO HIM, ENTITLED TO SHARE IN SURPLUS PLAN ASSETS UPON SUBSEQUENT PLAN TERMINATION?

V.

DOES *BRYANT* v. *INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.*, 793 F.2d 118 (6th Cir. 1986), *CERT DENIED* 479 U.S. 986, 107 S.Ct. 576, RETROACTIVELY APPLY TO REVERSIONS OCCURRING PRIOR TO THAT DECISION?

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VII.

RESPONDENT ACCEPTS THIS QUESTION AS STATED BY PETITIONER.

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BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, IRVING J. ROSENBAUM respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in its case.

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations which are set out in Appendix F of the Petition for a Writ of Certiorari, the following regulations are also involved in this case and are set out verbatim in Appendix A of this brief:

29 C.F.R. 2618.2

29 C.F.R. 2618.30

29 C.F.R. 2618.32(a)

COUNTER-STATEMENT OF THE CASE

All of the Plan's assets on termination, including the reversion, originated as contributions to the Plan made by Respondent IRVING J. ROSENBAUM ("ROSENBAUM") while he was president of Petitioner DAVIS IRON WORKS,

INC. ("DAVIS"). Instead of paying himself a higher salary or bonus, ROSENBAUM routinely contributed thousands of dollars annually to the Plan. It is significant that after ROSENBAUM retired in 1984, DAVIS did not contribute any money to the Plan prior to its termination.

As DAVIS points out at page 5 of its Petition, the segregation of ROSENBAUM's accrued benefit within the Plan was designed to defer personal federal income taxes on his benefit. However, the amendment was completely permissible under the Internal Revenue Code, and was not rejected by the Service as disqualifying the Plan. Nor did the amendment provide for an *indefinite* deferral of taxation on the benefits. In fact, ROSENBAUM did pay taxes in 1985 when his benefit was actually distributed to him by the Plan.

DAVIS' characterization of the dispute which led to the execution of the November 1, 1985 Agreement is inaccurate. ROSENBAUM's accrued benefit was a specific calculation based on the number of years of his service to DAVIS and his compensation level (R. 25: Exhibit B, Article X). When DAVIS discovered that ROSENBAUM's benefit had been calculated incorrectly, ROSENBAUM agreed that any overpayment placed in his segregated account would have to be returned to the main body of the pension plan. The parties disagreed as to how to allocate certain assets and interest. Quite simply, the parties resolved this dispute by an old-fashioned compromise: they split the difference! Thus, the sum of $2,381.11 (one-half of the disputed amount) was added to the undisputed portion of ROSENBAUM's accrued benefit and he received his total accrued benefit from the Plan on November 1, 1985. This was the entire dispute between the parties and it was fully and completely outlined, paragraph by paragraph, in the November 1, 1985 Agreement (R. 25: Exhibit E, ¶¶ 8-12, pp. 2-3).

SUMMARY OF ARGUMENT

1. 29 U.S.C. § 1110(a) voids the release in the case at bar to the extent that the participant purports to release the fiduciary of the pension plan from liability for a future breach of duty to the Plan.

2. The interpretation of a release and the adequacy of consideration for same are issues of state law not involving a federal question and are not sufficient reasons for granting review on a writ of certiorari.

3. If 29 U.S.C. § 1110(a) voids the release in issue, this Court need not reach the state contractual law issues.

4. Even where the language of the release is clear and unambiguous, the courts below were authorized to go beyond the broad language of the release in determining that the participant did not intend to release his claim to a share of the reversion.

5. Respondent was a participant within the meaning of 29 U.S.C. § 1002(7) and had standing to maintain his lawsuit under 29 U.S.C. § 1132(a) for a share of the reversion because on the date that the Plan was terminated, he had not yet received his vested accrued benefits from the Plan.

6. A former employee who has already received his actuarially vested benefits may maintain an action under 29 U.S.C. § 1132(a) to recover additional benefits under the Plan as opposed to monetary damages for breach of a fiduciary duty.

7. *Bryant* v. *International Fruit Products Company, Inc.*, 793 F.2d 118 (6th Cir. 1986), *cert denied* 479 U.S. 986, 107 S.Ct. 576, does not break with past law, and should be retroactively applied to the reversion in the case at bar.

8. The language of Petitioner's original pension plan which prohibits an amendment to the Plan that permits a reversion of the surplus assets to the employer upon termination of the Plan, falls within the *Bryant* case which held that such an amendment is null and void.

9. Petitioner's interpretation of the Plan provisions regarding amendments and reversions is contrary to ERISA, and is an abuse of discretion even under an arbitrary and capricious standard of review due to Petitioner's conflict of interest.

10. When a plan provision for a reversion of surplus assets to the employer is nullified, the allocation of surplus assets to the eligible participants is controlled by 29 C.F.R. § 2618.32(a), and not by the provisions of the pre-ERISA plan that has since been amended.

REASONS FOR DENYING THE WRIT

I.

A GENERAL RELEASE OF CLAIMS FOR BREACH OF FIDUCIARY DUTY EXECUTED BY A PENSION PLAN PARTICIPANT IN SETTLEMENT OF A PLAN-RELATED DISPUTE DOES NOT BAR FUTURE CLAIMS OF BREACH OF FIDUCIARY DUTY UNRELATED TO THE SETTLED DISPUTE.

DAVIS argues that the release in issue (R. 25: Exhibit E, ¶ 14) should be enforced to bar ROSENBAUM's cause of action to recover a portion of the surplus assets that reverted to DAVIS on the termination of the Plan. DAVIS relies on several cases involving general releases which purport to enforce said releases executed as part of a good faith settlement of a dispute.

The issue presented for review by DAVIS is misleading because a bona fide dispute may be resolved by a good faith settlement which contains a release applicable to present and past claims. However, the real issue is whether under ERISA, a participant in a plan can ever release a fiduciary from liability for a *future* breach of fiduciary duty that is not part of the dispute being settled by the agreement in question. The courts below have answered this question in the negative and no other federal court of appeals has issued a decision that reaches a contrary result. The prohibition against such releases is so plainly stated in 29 U.S.C. § 1110(a) that the dispute does not warrant settlement by this Court.

The courts below correctly ruled that 29 U.S.C. § 1110(a) voids the release to the extent that it purports to release the Plan's fiduciaries from an obligation to pay the reversion over to the Plan's participants rather than to DAVIS. 29 U.S.C. § 1110(a) states as follows:

> Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

In the case at bar, ROSENBAUM filed suit under 29 U.S.C. § 1132(a)(2) for DAVIS' breach of fiduciary duty under 29 U.S.C. § 1109. ROSENBAUM alleged that DAVIS, as the Plan administrator, breached its fiduciary duty by paying the surplus assets to DAVIS, the employer, rather than to the Plan's participants.

DAVIS argues that 29 U.S.C. § 1110(a) does not apply to the case at bar because DAVIS could have returned the reversion to the Plan and still refused to pay ROSENBAUM his proportionate share on the basis of the release. DAVIS assumes that such a refusal could not be a breach

of fiduciary duty under part 4 of Subtitle B of ERISA, and thus the release would not be void under 29 U.S.C. § 1110(a). See *Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988).

DAVIS' assumption is erroneous because 29 U.S.C. § 1104(a)(1)(A)(i) requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries," and under (D), "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of" ERISA. Under this statutory provision, a fiduciary owes a duty directly to plan participants. *Harlan* v. *Sohio Petroleum Co.*, 677 F.Supp. 1021 (N.D. Cal. 1988); *Kann* v. *Keystone Resources, Inc.*, 575 F.Supp. 1084 (W.D. Pa. 1983). If the Plan requires the fiduciary to pay a proportionate share of the surplus assets to ROSENBAUM, as a participant upon termination of the Plan, then DAVIS' failure to do so would be a breach of 29 U.S.C. § 1104(a)(1)(A) and (D). Since 29 U.S.C. § 1104(a)(1)(A) and (D) state a duty which arises under part 4 of Subtitle B of ERISA, liability for a breach of that duty cannot be released by ROSENBAUM.

The Sixth Circuit Court of Appeals effectively distinguished the two cases that DAVIS relied on for its argument that voluntary releases are not void under 29 U.S.C. § 1110(a). The case of *Sulit, Inc.* v. *Dean Witter Reynolds, Inc., supra*, was concerned with an agreement to arbitrate an ERISA claim. The Eighth Circuit ruled that such an agreement was not void under 29 U.S.C. § 1110(a) because it did not purport to relieve a fiduciary for any liability for that claim. It only affected the forum of the dispute. To the contrary, the *Sulit* court affirmed that 29 U.S.C. § 1110(a) will not permit a fiduciary to be relieved of its obligations to the plan.

The unreported decision of the Sixth Circuit in *Miller, et al.* v. *General Motors Corp.*, No. 87-1493 (6th Cir. 1988) involved an agreement which allowed the plaintiffs to purchase GM stock at below-market prices if they released GM from any liability arising out of the transfer of the plaintiffs from GM to EDS. The release covered past and present claims of the employees. The Sixth Circuit ruled that 29 U.S.C. § 1110(a) did not bar the release because the statute only applied to fiduciary duties owed to the pension plan and not to employment agreements.

ROSENBAUM does not argue, nor did the lower courts hold, that the release given in the November 1, 1985 Agreement was not effective as to the disputed claim resolved by that Agreement. The parties had a dispute over the amount of ROSENBAUM's accrued benefit and that dispute was settled by a compromise. ROSENBAUM could not now come into court and demand that the dispute be reopened. However, the *only* disputed claim that was the subject of the November 1, 1985 Agreement was the dispute over the accrued benefit. Nowhere in that Agreement (which was drafted by DAVIS' counsel in this appeal) do the parties recite that there is a dispute over the reversion. A simple examination of ¶¶ 8 through 11 of the Agreement details the extent of the dispute (R. 25: Exhibit E, ¶¶ 8-11, pp. 2-3). The claim for the reversion was neither disputed, settled nor released by the Agreement.

For this reason, the decision of the courts below does not conflict with either *Hoffa* v. *Fitzsimmons*, 673 F.2d 1345 (D.C. Cir. 1982) or *Waits* v. *Weller*, 653 F.2d 1288 (9th Cir. 1981). Neither decision involved a breach of fiduciary duty nor a release of liability for such a breach under 29 U.S.C. § 1110(a). Rather, these cases merely affirm that a good faith settlement of a dispute

cannot be reopened in the absence of fraud. In the case at bar, ROSENBAUM does not seek to set aside the compromise reached in the November 1, 1985 Agreement that established the amount of his accrued benefit. However, any release that purports to bar him from pursuing a *future* breach of fiduciary duty by DAVIS is void under 29 U.S.C. § 1110(a).

II.

A COURT IS AUTHORIZED TO GO BEYOND THE BROAD LANGUAGE OF A RELEASE TO DETERMINE ITS FAIRNESS AND THE INTENT OF THE PARTIES IN EXECUTING IT.

ROSENBAUM contends that the issue of interpretation of the release is subsidiary to the first issue presented for review. More importantly, standing alone, an issue of contract interpretation does not warrant review by this Court on a writ of certiorari. Contract interpretation is solely a matter of state law and does not involve a federal question. An alleged conflict between a federal court of appeals and a state court of last resort on a non-federal question is not one of the reasons for granting review under Supreme Court Rule 17.1

The significance of the issue raised by DAVIS is further diminished by the fact that the Sixth Circuit did not need to reach the issue of interpretation. Both courts below held that 29 U.S.C. § 1110(a) prohibited the enforceability of the release. Therefore, if this Court does not accept DAVIS' first issue as sufficient grounds to merit review, the release will be deemed unenforceable, regardless of whether the lower courts acted properly in interpreting the release.

With regard to the merits of DAVIS' argument, the law of releases in Michigan clearly authorizes the inquiry which the courts below conducted into the scope

of the release. Even where the language of a release is clear and unambiguous, a court is authorized to go beyond the broad language of a release to determine the fairness of a release and the intent of the parties in executing it. *Denton* v. *Utley*, 350 Mich. 332, 86 N.W.2d 537 (1957); *Harris* v. *Lapeer Public School System*, 114 Mich. App. 107, 318 N.W.2d 621 (1982); *Auto-Owners Insurance Co.* v. *Higby*, 57 Mich. App. 604, 226 N.W.2d 580 (1975).

In the case at bar, the Sixth Circuit determined from the circumstances surrounding the execution of the release that ROSENBAUM did not intend to release his claim to a share of the reversion. The Court relied on the fact that as of the date the release was executed, DAVIS had not claimed the reversion for itself, nor had even calculated the extent of such reversion. In addition, under the terms of the Plan then in effect, and considering that the release pre-dated the Sixth Circuit's decision in *Bryant* v. *International Fruit Products Company, Inc., supra*, the courts below properly concluded that ROSENBAUM did not even believe that he had a claim to the reversion at the time that he executed the release.

III.

THE ADEQUACY OF CONSIDERATION SUPPORTING A CONTRACT IS STRICTLY A MATTER OF STATE CONTRACTUAL LAW AND IS NOT OF SUCH CHARACTER AS TO WARRANT A REVIEW ON WRIT OF CERTIORARI BY THE UNITED STATES SUPREME COURT.

Like question II, the issue presented by question III is subsidiary to question I, and is strictly a matter of state contractual law. For the same reasons cited in opposition to question II, this issue is not significant under Supreme Court Rule 17.1, nor would this Court even

need to address it if a review on a writ of certiorari is not granted on question I. In addition, the Sixth Circuit did not even rely on a failure of consideration as a grounds for invalidating the release.

IV.

A RETIRED PARTICIPANT OF A DEFINED BENEFIT PENSION PLAN, WHOSE VESTED BENEFIT HAS NOT BEEN DISTRIBUTED TO HIM IS ENTITLED TO SHARE IN SURPLUS PLAN ASSETS UPON SUBSEQUENT PLAN TERMINATION.

DAVIS argues that ROSENBAUM does not have standing to maintain his lawsuit under 29 U.S.C. § 1132(a). DAVIS contends that ROSENBAUM should be deemed to have constructively received his accrued benefits when, after his retirement, he segregated the lump-sum equivalent of his accrued benefit into a self-directed trust account within the Plan itself. Consequently, this "constructive receipt" of benefits would take ROSENBAUM out of the definition of "participant" set forth in 29 U.S.C. § 1002(7). DAVIS further argues that unless ROSENBAUM is deemed to have received his accrued benefit when the Plan segregated his benefit into a self-directed account, such segregated accounts will allow retired employees to "indefinitely" defer federal income taxation on their benefits.

In order for ROSENBAUM to maintain his action against DAVIS under 29 U.S.C. § 1132(a), he must meet the statutory definition of "participant" as set forth in 29 U.S.C. § 1002(7):

> The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit

> plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

In an effort to disqualify ROSENBAUM under the above definition, DAVIS argues that ROSENBAUM was not eligible to receive a benefit from the Plan when it terminated.

As the Sixth Circuit stated, DAVIS had not, in fact, actually distributed benefits to ROSENBAUM before the Plan terminated. Thus, DAVIS is forced to argue that ROSENBAUM should be deemed to have constructively received his benefits. Were this the case, DAVIS argues, ROSENBAUM would not be considered a participant under the "lump-sum" rule set forth in *Kuntz* v. *Reese*, 785 F.2d 1410 (9th Cir. 1986).

ERISA contains no provision for constructive receipt of pension benefits. DAVIS must resort to the Internal Revenue Code which provides rules for taxation of pension benefits upon receipt. Unfortunately for DAVIS, 26 U.S.C. § 402(a)(1) provides that pension benefits are taxable to the distributee when *actually distributed*. In an effort to eliminate ROSENBAUM as a participant, DAVIS argues that the segregated asset account into which ROSENBAUM placed his pension benefits was not permitted under the Code. Therefore, states DAVIS, ROSENBAUM is deemed to have received his benefit when the segregated asset account was created in 1984.

DAVIS is plain wrong when it states that in a segregated asset account, an early retiree's benefits are deferred from taxation indefinitely. Such an arrangement would clearly violate 26 U.S.C. § 401(a)(14), which requires that benefits be distributed at the earlier of age 65 or normal retirement age. Nowhere in the segregated asset amendment does DAVIS eliminate this statutory

requirement (R. 47: Exhibit 6, pp. 12-13). The Plan itself clearly requires ROSENBAUM, as an early retiree, to start receiving his benefits not later than his normal retirement age (R. 25: Exhibit B, § 12.1).[1]

DAVIS argues that ROSENBAUM never elected a commencement date to begin receiving benefits under the early retirement section of the Plan. If so, then the administrator of the Plan, DAVIS, would have had to begin making distributions to ROSENBAUM when he reached age 65, in order to comply with ERISA. ROSENBAUM would then have had to pay taxes on his benefits upon distribution. The segregated asset account created no "loophole" through which ROSENBAUM or any other early retiree could defer taxation or benefits indefinitely. The amendment did nothing more than what it was designed to do: permit an early retiree to direct the investment of his assets in a pension plan until such time as he either chose to withdraw his benefits, or was forced to withdraw them when he reached age 65.

The concept of remaining a participant while deferring benefits is consistent with 29 U.S.C. § 1002(7) as well as with the Internal Revenue Code. That is why DAVIS identified ROSENBAUM as a "separated participant with deferred pension benefits" in its filings with the Social Security Administration after ROSENBAUM retired (R. 50: Reply Brief, Exhibit A). ERISA-qualified plans permit participants to defer benefits. ROSENBAUM merely adopted another form of deferral.

Even if ROSENBAUM had actually received his vested benefits in 1984, he would still be considered a participant for purposes of seeking a share of the surplus

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[1] In this case, ROSENBAUM's normal retirement age is age 65, which age he did not reach before the Plan was terminated in 1985 (R. 25: Exhibit B, § 2.22).

assets. In *Amalgamated Clothing and Textile Workers Union AFL-CIO, et al.* v. *Murdock*, 861 F.2d 1406 (9th Cir. 1988), the Ninth Circuit distinguished its own decision in *Kuntz* between a former employee that seeks benefits under the plan and one that seeks monetary damages for breach of fiduciary duty. The Sixth Circuit agreed that the *Kuntz* rule only disqualifies a former employee who seeks monetary damages. Where a former employee seeks to recover a benefit that is payable by the plan, he is considered to be "eligible to receive a benefit" under 29 U.S.C. § 1002(7).

This Court's decision in *Firestone Tire and Rubber Co.* v. *Bruch*, __ U.S. __, 109 S.Ct. 948 (1989), supports this important distinction. This Court stated that:

> In order to establish that he 'may become eligible for benefits', a claimant must have a colorable claim that (1) he will prevail in a suit for benefits . . . *Firestone, supra* at 958.

In the case at bar, the Sixth Circuit determined that ROSENBAUM had a colorable claim that he would prevail in a suit to recover the reversion for the Plan's participants.

DAVIS attempts to limit *Firestone* to claims for "vested benefits" only, arguing that surplus assets are not vested benefits under *Chait* v. *Bernstein*, 835 F.2d 1017 (3rd Cir. 1988). However, 29 U.S.C. § 1002(7) bases eligibility on a "benefit of any type." It is not restricted to vested benefits. In *Chait*, the Third Circuit merely noted that 26 U.S.C. § 411(d)(3), which makes certain accrued benefits nonforfeitable to the employees, does not extend to surplus assets.[2] There is no suggestion

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[2] This is not surprising, considering that 29 U.S.C. § 1344(d)(1) permits surplus assets to revert to employers if not prohibited by the plan.

that if a plan required that surplus assets be distributed to the employees on termination of the plan, such assets would not be considered a "benefit" under the plan.

In the case at bar, the Sixth Circuit held that the Plan required that DAVIS distribute the surplus assets to the participants. Although the surplus is not a vested benefit, it is a type of benefit under the Plan. Thus, a former employee's colorable claim to such benefits makes him a participant under *Firestone* and 29 U.S.C. § 1002(7). As the Sixth Circuit noted, any other ruling would effectively allow plan administrators to insulate surplus assets from the claims of participants by paying out actuarially vested benefits and representing that no further benefits were payable. As in *Amalgamated*, the courts will recognize a class of "equitably-vested" benefits for which suits can be maintained under 29 U.S.C. § 1132(a).

V.

BRYANT v. *INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.*, RETROACTIVELY APPLIES TO REVERSIONS OCCURRING PRIOR TO THAT DECISION.

The issue raised by DAVIS with regard to the retroactive application of *Bryant* was never raised in the Sixth Circuit, nor in the District Court. This Court has held that a question not raised in the lower courts is not open in a proceeding on a petition for certiorari. *Ellis* v. *Dixon*, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955), *reh denied* 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed. 759.

The first factor that must be met in determining whether a civil decision is to be applied retroactively is whether the decision represents a clear break with past

law. *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984). *Bryant* did not break with past law, but merely applied 29 U.S.C. § 1344(d)(1) to the pension plan involved therein. *Bryant* does not purport to disagree with the earlier decisions of *In re C. D. Moyer Pension Trust*, 441 F.Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion* 582 F.2d 1273 (3rd Cir. 1978), and *Washington-Baltimore Newspaper Guild* v. *Washington Star Co.*, 555 F.Supp. 257 (D.D.C. 1983), *aff'd without opinion* 729 F.2d 863 (D.C. Cir. 1984). Rather, *Bryant* distinguishes the plans involved in those cases from the plan before it. There is nothing in the *Bryant* decision that indicates that the Court is breaking with past law. An indication of such is that the Sixth Circuit did not hesitate to turn the reversion over to the employees in *Bryant*, although no prior decisions in the Circuit had addressed the issue.

Nowhere in its decision does the court below state that *Bryant* "created new law" as DAVIS so boldly claims. The Sixth Circuit did acknowledge that "for the first time" *Bryant* held an amendment like the one in the case at bar to be void. However, that was only because nobody had challenged such amendments prior to *Bryant*. Past law did not sanction DAVIS' actions. *Bryant* did not change the law in place. Clearly, the Sixth Circuit was correct in applying *Bryant* to the facts before it.

VI.

PETITIONER'S PENSION PLAN IS CONTROLLED BY *BRYANT* v. *INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.*, RATHER THAN BY *IN RE C.D. MOYER COMPANY TRUST FUND* OR *WILSON* v. *BLUEFIELD SUPPLY COMPANY.*

DAVIS would have this Court believe that the Third, Fourth, Sixth and District of Columbia Circuits are in

conflict over the issue of whether surplus assets are to be returned to the employer or employees upon termination of a pension plan. In fact, there is no conflict between the Circuits because, as stated in *Bryant*, "each case of this kind is controlled by the language of the documents creating the particular plan involved." *Bryant, supra,* at 123.

DAVIS received the surplus assets from the Plan because the 1979 Restated Plan provided for a reversion in ¶ 22.2(E). ROSENBAUM, as a participant in the Plan, argued that under *Bryant*, DAVIS was not permitted to amend the Original Plan in 1979 to provide for a return of the reversion to the employer.

The Original Plan permitted amendments to the Plan with certain exceptions, as set forth in Article XII entitled "AMENDMENT AND TERMINATION":

> 12.1 The Employer by action of its Board of Directors may amend this trust at any time, or from time to time, as evidenced by an instrument in writing executed in the name of the Employer by a duly authorized officer under the corporate seal of the Employer, provided, however:
>
> * * *
>
> (c) No funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the employer. (R. 25: Exhibit A, p. 28).

Clearly, the Original Plan did not allow DAVIS to amend the Plan to permit surplus assets to revert to the employer on termination. The issue of law before the Sixth Circuit was whether DAVIS properly amended the Plan in 1979 to provide for the reversion to it of surplus assets.

This case is controlled by the Sixth Circuit's decision in *Bryant* because the *Bryant* case is factually on point. In *Bryant*, the employer created a defined benefit plan in 1959 which was qualified under 26 U.S.C. § 401(a)(2). The 1959 plan contained the following prohibition against reversions to the employers:

> Section 5.3 In no event and under no circumstances shall any contributions to this Trust by the Employer, nor any of the Trust Estate or the income therefrom, revert to or be repaid to the Employer; and all amounts paid by the Employer to the Trustees shall be used and applied for the sole and exclusive benefit of the participants under this Trust or their beneficiaries or estates. *Bryant, id* at 120.

In 1976, the employer amended and restated the plan to conform with ERISA. The anti-reversion sections of the 1959 plan were omitted. In 1982, the plan was amended again to provide that any excess assets remaining as a result of actuarial error would be returned to the employer. The plan was thereupon terminated. $61,000.00 was distributed to the participants and $139,000.00 was returned to the employer.

The plaintiffs were all participants in the plan when it was terminated. They sought a distribution of the excess assets to themselves. The district court ruled in favor of the employer. On appeal, the Sixth Circuit reversed the lower court and ruled in favor of the participants.

The Sixth Circuit relied principally on the language in ¶ 5.3 of the 1959 plan that prohibited any reversion to the employer. The Court concluded that such prohibition was more explicit than in the earlier cited cases.

Since the surplus assets originated as contributions, they could not revert to the employer. The Sixth Circuit remanded the case back to district court to fashion an equitable allocation of the excess funds among the participants.

Bryant controls this issue in the case at bar. The Original Plan assures the participants that once contributed, no money paid into the fund can ever be reclaimed by the employer (R. 25: Exhibit A, ¶ 12.1(c), p. 28). As in *Bryant*, the language in 12.1(c) is absolute:

> *No funds contributed* to the trust *nor assets* of the trust *shall ever revert to* or be made available to *the Employer.*

This language precludes the amendment that was adopted in 1979 to provide for a reversion of funds to DAVIS. As the Sixth Circuit noted, it does not matter how the surplus was created, because the surplus did originate as contributions.

In *Bryant*, the Sixth Circuit distinguished the two district court cases that were relied on by the employer. The Court noted that neither the *Moyer* nor *Washington Star* plans contained language similar to that found in ¶ 5.3 of the *Bryant* plan. In addition, *Moyer* and *Washington Star* both involved pension plans that made no provisions for the allocation of excess assets among the participants upon the termination of the plan. Thus, the respective district courts did not feel obligated to reward the participants with more moneys than would have otherwise been received as defined benefits.

In the case at bar, the Original Plan does provide that on termination, excess assets are to be distributed to the participants:

> 12.4 Upon termination of the trust any assets of the trust, other than contracts issued on the lives of the participants, shall be distributed among the then participants in proportion to the attained cash values upon contracts then outstanding on the lives of such participants. (R. 25: Exhibit A, ¶ 12.4, pp. 29-30).

Thus, the feature that distinguished *Bryant* from *Moyer* and *Washington Star* is just as prevalent in the case at bar.

DAVIS' reliance on the absence of the prefatory "No amendment shall" language from ¶ 12.1(c) of the Original Plan is much ado about nothing. As the trial court noted, the entire article is entitled "Amendment and Termination." Paragraph 12.1 opens with a general paragraph permitting plan amendments, subject, however, to four stated exceptions. Subparagraphs (a), (b), and (d) prohibit a certain type of amendment. Subparagraph (c) contains a prohibition against reversions to the employer. The fact that subparagraph (c) is included with three other prohibited types of amendments is sufficient to conclude that amendments permitting reversions are likewise prohibited. Furthermore, DAVIS cannot accomplish by an amendment what it is expressly prohibited from doing by deleting the prohibition first. *Bryant, supra* at 123.

The courts below also adequately distinguished the decision in *Wilson* v. *Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). Quite simply, the lower courts used the same basis that the Fourth Circuit used to distinguish *Wilson* from *Bryant*. The non-reversion provision in *Bryant* barred repayment to the employer of "contributions." The nondiversion provision in *Wilson* barred a withdrawal or transfer from the "Fund." The Fourth

Circuit noted that the *Moyer* plan also made "no reference to the return of contributions." The Fourth Circuit then held that *based on a reading of the Wilson plan*, the term "Fund" did not encompass residual assets. Therefore, a reversion of surplus assets was not prohibited by the *Wilson* plan.

The lower courts correctly held that the Original Plan in the case at bar was more like the *Bryant* plan than the plan in *Wilson*. The Original Plan prohibits a reversion of "funds contributed," as opposed to a withdrawal from the "Fund." There can be no question that the Original Plan's prohibition encompasses surplus assets as well as accrued benefits since ¶ 12.1(c) uses both of the terms "funds contributed" and "assets of the trust."

DAVIS also argues that the Plan gives the Administrator the power to interpret and construe provisions of the Plan and that DAVIS interpreted the Plan to permit the amendment that resulted in the employer being entitled to keep the reversion on termination (R. 25: Exhibit B, §§ 3.5 and 7.4). DAVIS argues that its decision as Administrator was not arbitrary and capricious and must be upheld by the courts even if another interpretation is reasonable.

The arbitrary and capricious standard relied upon by DAVIS is narrower than DAVIS would have it appear. The Plan itself requires that DAVIS' interpretation be consistent with the intent of the Plan and shall comply with the terms of ERISA (R. 25: Exhibit B, § 3.5(A)).

In this Court's recent decision in *Firestone*, the arbitrary and capricious standard was examined with reference to denial of benefit actions under 29 U.S.C. § 1132 (a)(1)(B). This Court concluded that a denial of benefits under this statute is to be reviewed under a *de novo* standard unless the plan gives the administrator discre-

tionary authority to determine eligibility for benefits or to construe the terms of the plan.

While not made applicable to breach of fiduciary duty actions under 29 U.S.C. § 1132(a)(2), the principles behind *Firestone* seriously weaken the applicability of the arbitrary and capricious standard to other ERISA actions. This Court rejected the rationale behind applying the same standards of judicial review found in the Labor Management Relations Act to ERISA. Yet those standards are the source of the arbitrary and capricious standard as applied to breaches of fiduciary duty. *Gordon* v. *ILWU-PMA Benefit Funds*, 616 F.2d 433 (9th Cir. 1980). There would appear to be no rational reason for distinguishing between the standard of review to be applied to actions arising under either 29 U.S.C. § 1132(a)(1)(B) or § 1132(a)(2).

Nowhere in the Plan at bar does the Plan use the term "discretionary" with regard to the Administrator's duties. In the absence of such discretion, *Firestone* would suggest that a *de novo* standard of review would apply. Yet even where such discretion can be gleaned, *Firestone* cautions that if a fiduciary is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there has been an abuse of discretion.

In the case at bar, DAVIS, as Administrator, interpreted the Plan in such a manner that provided a windfall for DAVIS, the employer. Such a conflict of interest was clearly a factor in DAVIS' interpretation of the Plan. Even under the arbitrary and capricious standard, the courts below were entitled to take this conflict into account when they determined that DAVIS' interpretation of the Plan was not reasonable under the term of the Original Plan or ERISA.

This Court had the opportunity to review *Bryant* on a writ of certiorari and chose not to do so. The courts below have not deviated from *Bryant* and the Plan in the case at bar falls squarely within *Bryant*. There is no conflict between the Circuits as to the law to be applied. Only differences in plan language have dictated the different results. For these reasons, ROSENBAUM submits that the courts below properly held that the reversion amendment was void and that the reversion belonged to the participants of the Plan.

VII.

WHEN A DEFINED BENEFIT PENSION PLAN IS JUDICIALLY DETERMINED TO HAVE BEEN IMPERMISSIBLY AMENDED TO PERMIT A DISTRIBUTION OF SURPLUS ASSETS UPON PLAN TERMINATION TO THE EMPLOYER RATHER THAN TO PARTICIPANTS, THE PLAN'S PRE-AMENDMENT DEFINITION OF "PARTICIPANT" DOES NOT CONTROL THE ALLOCATION OF SURPLUS ASSETS TO THE PARTICIPANTS.

DAVIS' final argument claims that ROSENBAUM should not be entitled to share in the reversion of assets because he is not a participant as defined by the Original Plan. DAVIS' argument contains at least one faulty premise; the belief that the courts below "re-instated" the allocation provisions of the Original Plan when the reversion amendment of the Restated Plan was nullified. This did not occur.

When the District Court below nullified the reversion amendment, the Restated Plan no longer provided for a reversion to the employer. The Plan was now silent on what to do with the reversion. The District Court properly looked to the regulations enacted to interpret 29 U.S.C. § 1344(d)(1). 29 C.F.R. § 2618.30 provides that if residual assets do not revert to the

employer, then they *shall* be allocated in accordance with 29 C.F.R. § 2618.32(a). This regulation allocates the residiual assets among a "pool of eligible participants." The individuals comprising that pool are essentially the plan participants who received a distribution of their accrued benefits on the date that the Plan's assets were distributed. 29 C.F.R. § 2618.2. Since ROSENBAUM was one of the participants who received payment of his accrued benefits on the date that the Plan's assets were distributed, he is entitled to share in the allocation of the residual assets under the formula set forth in 29 C.F.R. § 2618.32(a).

The trial court did not rely on the definition of "participant" in the Restated Plan any more than it utilized the method of allocation from the Original Plan. As the Sixth Circuit pointed out in the case below, the remainder of the Restated Plan was left intact and is valid. There would have been no reason to look to the pre-ERISA definition of "participant" as a basis for allocating the residual benefits.[3] This issue was properly decided under ERISA by the courts below and does not merit further review.

CONCLUSION

For the foregoing reasons, Respondent submits that the lower courts properly decided each issue raised by Petitioner. Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari to review the decision of the United States Court of

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[3] In fact, the only reason that the Original Plan excluded retired employees from its definition of "participants" is because, unlike ERISA plans, the Original Plan had no provision for a retired employee to keep his or her benefit in the plan until reaching normal retirement age.

Appeals for the Sixth Circuit which affirmed the judgment of the United States District Court for the Eastern District of Michigan in the amount of $43,832.07 plus costs and prejudgment interest as provided in the judgment.

Respectfully submitted,

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Dated: August 15, 1989

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

RELEVANT STATUTORY PROVISIONS

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29 C.F.R. § 2618.2

"Pool of eligible participants and beneficiaries" means —

(a) For a contributory plan that provides for reversion of residual assets to the employer, those individuals entitled to benefits in priority category 2, determined as of the date plan assets are to be distributed; and

(b) For any plan that does not provide for reversion of residual assets to the employer, those individuals entitled to benefits in priority categories 2 through 6, determined as of the date plan assets are to be distributed.

"Priority categories" or "priority category" means the categories contained in sections 4044(a)(1) through (6) of the Act that establish the order in which plan assets are to be allocated.

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29 C.F.R. § 2618.30 Allocation to employer.

(a) Except for residual assets that are attributable to employee contributions, as com-

puted under Sec. 2618.31, residual assets in a plan may revert to the employer if —

(1) The plan provides, as of the date of plan termination, for the return of residual assets to the employer; and

(2) The distribution does not violate any provision of law.

(b) If the requirements of paragraph (a) of this section are not satisfied, residual assets shall be allocated among the pool of eligible participants and beneficiaries in accordance with Sec. 2618.32(a).

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29 C.F.R. § 2618.32. Allocation among the pool of eligible participants and beneficiaries.

(a) *Plans that do not provide for reversion to the employer.* Subject to the provisions of paragraphs (c) of this section, in a plan to which Sec. 2618.30(b) applies, the share of each member of the pool of eligible participants and beneficiaries in the residual assets shall be computed by multiplying total residual assets by a fraction —

(1) The numerator of which is the present value of the member's benefits assigned to priority categories 2 through 6, pursuant to Sec. 2618.12 through Sec. 2618.16; and

(2) The denominator of which is the present value of all benefits assigned to priority categories 2 through 6, pursuant to Sec. 2618.12 through Sec. 2618.16.